

FEB 14 1967

No. 20550

United States Court of Appeals for the Ninth Circuit

NATIONAL FARMERS UNION PROPERTY
and CASUALTY COMPANY,

Appellant,

vs.

LAURENCE COLBRESE, JR.,

Appellee.

On Appeal from the United States District Court
for the District of Montana.

Petition for Rehearing

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_____, Clerk

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To the Honorable Circuit Judges Barnes, Jertberg and
Ely of the United States Court of Appeals for the
Ninth Circuit:

Appellee requests a rehearing. This Court has held that it is the duty of the Federal Court to examine and ascertain how the local State Supreme Court would decide a case.

Young v. Aeroil Products Co., 1957,
9th C.C., 248 F. 2d 185.

This Court has held that the considered view of a district court as to the law of the state in which it sits will not be reversed unless shown to be clearly wrong, or inescapably wrong, or patently erroneous.

Bellon v. Heinzig, 1965, 9th C.C.,
347 F. 2d 4;

Gumataotao v. Government of Guam,
1963, 9th C.C., 322 F. 2d 580.

District Judge W. J. Jameson investigated to ascertain how the Montana Supreme Court would decide this case. He procured the briefs on appeal submitted to the Montana Supreme Court in *Safeco Ins. Co. of America vs. Northwestern Mutual Insurance Co.*, 1963, 142 Mont. 155, 382 P. 2d 174. The reasons upon which the present opinion of this Court is based were presented to and rejected by the Montana Supreme Court in *Safeco*. Respondent in *Safeco* in his brief urged:

"I.

"STATEMENT OF THE CASE

"A. SUMMARY

" * * *

"At the time of the accident Dean owned a liability insurance policy issued by Safeco, and Bear

Paw owned a liability insurance policy issued by Northwestern. If Dean was the 'owner' of the car on May 11th, the Safeco policy is responsible. If Bear Paw was the 'owner' on May 11th, Northwestern is responsible.

"The sole problem in the case is one of definition. What does the word 'owner' mean as used in two policies?" (P. 5.)

He cited and quoted the following Montana R.C.M. 1947 statutes—53-133(f); 53-419; 53-109. In argument he said:

"II.

"ARGUMENT

"A. THE PROBLEM

"The problem here is one of definition. What does the word 'owner' mean as used in the insurance policies written by the respective companies? An insurance policy is a contract. (Sec. 2, Ch. 286, L. 1959.) Contracts of insurance are to be interpreted as other contracts, and must be interpreted to give effect to the mutual intention of the parties. (Sec. 13-702, R.C.M. 1947; *Stevens v. Steck*, 101 Mont. 569, at 576, 55 Pac. 2d 7.)

"Respondents contend that Section 53-109(d) R.C.M. 1947, is a recording statute governing the record title as distinguished from ownership; that Section 53-133, R.C.M. 1947, defines ownership.

"Respondents recognize the rule that the law in existence at the time of the formation of a contract may be read into it. (Appellants' Brief, p. 35-36.) Such rule is of no real assistance here because the problem is, which law do we read in? The major effort of this brief is to indicate that Section 53-133 R.C.M. 1947, which defines 'owner' should be read into the contract, and that Section 53-109(d), which does not so much as use the word 'owner', should not.

"B. *THE MEANING OF THE WORD
'OWNER.'*

"(1) *The intention of the parties and practical consideration.*" (Pp. 13-14.)

* * *

"(2) *Dean was the Owner under the General Law of Sales.*" (P. 18.)

* * *

"(3) *The Statute of Frauds.*" (P. 20.)

* * *

"4. *The registration law (Section 53-109d) should not control the definition of ownership.*

"It is Respondents' position that the insurance policies involved should not be defined on the basis of Section 53-109d, because:

"(a) Such a result is unrealistic,

"(b) Is not compelled by the statutes,

"(c) Is not compelled by the case authority.

"(a) *A literal application of 53-109d is unrealistic.*" (P. 24.)

* * *

"5. *Section 153-133(f), R.C.M. 1947 should control the meaning of the word 'owner'.*" (P. 28.)

He discussed not only Montana case authority, but he expended 13 printed pages on the California registration law and California decisions. (Pp. 32-46.)

Is it not significant that the Montana Supreme Court rejected these same arguments and reasons upon which the present opinion is based?

If the present opinion is permitted to stand, it will not only reverse the considered view of the local District Court after investigation of local Montana law, it

will directly contradict or reverse the action previously taken by the Montana Supreme Court in *Safeco*.

The present opinion relies upon the interpretation of California law in *Yoshido*, and the Hawaii law in *Teixeira*. The effect of those cases is that the word "owned" means something less than an absolute and unqualified title. Not only did the Montana Supreme Court reject the viewpoint represented by these cases in *Safeco*, Montana has held directly to the contrary in *Keating v. Universal Underwriters*, 1958, 133 Mont. 89, 320 P.2d 351. That case holds that "owned by" means an absolute and unqualified title, and that failure of an insurance policy to define "owned" creates an ambiguity which must be resolved against the insurance company.

Appellee did not argue orally or in brief the reasons upon which the present opinion is based. They were rejected by the Montana Supreme Court in *Safeco*; that fact had been investigated and ascertained by District Judge Jameson; and appellee believes that before the considered view of the District Judge is reversed, that appellee should be permitted on rehearing to show how the Montana Supreme Court has in fact already considered and rejected the same reasons.

Respectfully submitted,

CROWLEY, KILBOURNE, HAUGHEY,
HANSON & GALLAGHER

By: CALE CROWLEY

One of the Attorneys for Appellee

I certify that in connection with the preparation of this Petition For Rehearing, I have examined Rule 23, and, in my opinion, the foregoing is in full compliance, is well founded, and is not interposed for delay.

CALE CROWLEY

One of the Attorneys for Appellee

ACKNOWLEDGEMENT OF SERVICE

Service of the foregoing Petition and receipt of a true and correct copy thereof is hereby acknowledged this 29th day of November, 1966.

WIGGENHORN, HUTTON,
SCHILTZ & SHEEHY

By:.....
Attorneys for Appellant